PERBADANAN KEMAJUAN NEGERI SELANGOR

v.

WORLDWIDE HOLDINGS BHD;
SHOPTRA JAYA (M) SDN BHD (INTERVENER)

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB PATAIL J
[ORIGINATING SUMMONS NO: D4-24-333-2006]
18 MAY 2007

COMPANY LAW: *Arrangement, scheme of - Court approval - Whether applicant sought to obtain court convened meeting for another legal entity to acquire company shares - Whether proposed scheme not envisaged under s. 176 Companies Act 1965*

This was an application by Perbadanan Kemajuan Negeri Selangor ('PKNS') under s. 176 of the Companies Act 1965 ('s. 176') for an order of court to sanction a scheme of arrangement. The scheme of arrangement was proposed to be implemented between the respondent, *ie*, Worldwide Holdings Berhad ('WHB'), PFFIM (a wholly owned subsidiary of PKNS) and the minority shareholders of WHB. The applicant PKNS was the majority shareholder of WHB.

Held (dismissing the application):

(1) The scheme of arrangement proposed by PKNS was in fact a take over of WHB. It was not a direct take over by PKNS. PKNS was not a proposed party to the scheme of arrangement. PKNS was to transfer all of its WHB shares to PFFIM prior to the scheme of arrangement becoming effective. The take over was, in law, a take over by PFFIM. As such, the application for take over ought to be made by PFFIM. PFFIM could not do so since it was not a member of WHB. Hence, the application by PKNS was to obtain a court order for a court convened meeting for another legal entity to acquire its shares and the shares of the minority shareholders. It was not a scheme of arrangement envisaged under s. 176. (paras 18, 19 & 20)

(2) WHB was a public listed company. In respect of public listed companies, specific laws have been put into effect, the purpose of which was to obtain and maintain the confidence of investors to purchase shares in public listed companies as minority shareholders. If there were no specific laws, s. 176 would apply. The fact that there were specific laws meant that specific legislation must be applied. For this reason, the Securities Commission Act 1993, which specifically applied to take over of public listed companies, must be adhered to. (paras 21)

(3) The present application was made while various other applications as well as exemptions were outstanding from the administrative authorities. The order of court under s. 176 should only be resorted to after all administrative approvals and exemptions have been obtained and other pre-conditions satisfied. (para 22)

Case(s) referred to:

Australian Securities Commission v. Marlborough Gold Mines Ltd [1993] 112 ALR 627 ***(refd)***

Re NFU Development [1973] 1 All ER ***(refd)***

Re NRMA Ltd [2000] 33 ACSR 595 ***(refd)***

Re Sonodyne Internation Ltd [1994] 15 ACSR 494 ***(refd)***

Sri Hartamas Development Sdn Bhd v. MBF Finance Bhd [1990] 1 CLJ 827; [1990] 3 CLJ (Rep) 106 HC ***(refd)***

Twenty first Century Oils Sdn Bhd v. Bank of Commerce (M) Bhd & Ors (No 2) [1993] 2 CLJ 677 HC ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 176(1), 180

For the applicant - LK Mak (SY Soh & S Suhendran with him); M/s Kadir, Andri & Partners

For the intervener - G Ravi (R Thayakugan with him); M/s Ravi Beltran & Co

Reported by Usha Thiagarajah

JUDGMENT

Abdul Wahab Patail J:

[1] Perbadanan Kemajuan Negeri Selangor ("PKNS") has by this originating summons applied for an order to convene a scheme meeting under s. 176 of the Companies Act 1965 (s. 176).

[2] Worldwide Holdings Berhad ("WHB") had on 23 August 2006 announced that PKNS is proposing to implement a Scheme of Arrangement ("the Scheme of Arrangement") proposed to be implemented between WHB, PKNS-Federal Furniture International (M) Sdn. Bhd. ("PFFIM") and the minority shareholders of Worldwide Holdings Berhad ("WHB MI Shareholders") pursuant to s. 176.

[3] The proposal was to take WHB private *via* PFFIM, a wholly owned subsidiary of PKNS. PKNS is the majority shareholder of WHB and as at 30 August 2006 held 90,388,990 WHB Shares, ie, 51.03% of the shares while other shareholders held the balance of 48.97%.

[4] The proposal to take WHB private involves:

a) PKNS transferring its entire 51.03% shareholding in WHB to PFFIM ("the proposed share injection"); and

b) PFFIM acquiring from WHB MI Shareholders all their 48.97% shares in WHB at the price of RM3.50 or the adjusted price per WHB Share, as may be applicable, pursuant to the Scheme of Arrangement.

c) Delisting of WHB.

[5] Two shareholders Shoptra Jaya Sdn. Bhd. ("Shoptra") have written to oppose the application to convene meetings to approve the Scheme of Arrangement ("the Scheme"). Shoptra holds 200,000 units, or approximately 0.17% of the WHB Shares.

[6] When Perbadanan Kemajuan Negeri Selangor ("PKNS") applied under this originating summons for an order to convene a scheme meeting under s. 176 of the Companies Act 1965, Shoptra filed their summons in chambers on 26 September 2006 to intervene into the action *inter alia* on grounds that:

a) The usage of the instrument under Scheme of Arrangement ("SOA") *vide* s. 176 Companies Act 1965 ("CA") is unlawful and illegal;

b) No prior consultation and approval of the shareholders were sought prior to the application to convene the court convened meeting pursuant to s. 176 of the Companies Act.

A c) The respondent, WHB had not safeguarded the rights of the Minority Shareholders such as the Interveners in failing to oppose and/or object the originating summons and opting not to attend the court hearing personally or by counsel and was also done without the prior consultation of the shareholders
B of WHB.

d) The applicant, PKNS being a non-party has no locus to court for an order for the court convened meeting;

C e) The Scheme of Arrangement is an "abuse" and a "coercion" as it forces the WHB Minority Shareholders to transfer all their WHB Shares to PFFIM at a consideration price of RM3.50 or such adjusted price per WHB Share.

[7] Section 176 of the Companies Act 1976 provides:

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> 176 Power to compromise with creditors and members
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> (1) Where a ... arrangement is proposed ... between the company and its members or any class of them the Court may on the application in a summary way **of the company ... or member of the company**, ..., order a meeting of the
E creditors or class of creditors or of the members of the company or class of members to be summoned in such manner as the Court directs.

F **[8]** Nothing in s. 176 requires a member proposing an arrangement to first consult with or obtain the approval of other shareholders before making an application under s. 176. There is no requirement, therefore, for PKNS as a member to conduct such consultation or seek such approval before making this
G application.

[9] However, the words "arrangement is proposed ... between the company and its members or any class of them ..." in s. 176 does require that there be not only in existence a scheme of arrangement, but that it has also been proposed. That requirement
H exists so that if the other shareholders agreed, there would be no necessity to resort to application to the court for a court convened meeting. It is to avoid commencing unnecessary proceedings in court and taking up the time and resources of the court. Entertaining an application that ignores such requirement
I would defeat the purpose.

[10] The issue in this case is between shareholders *inter se*, and does not concern WHB whose shares are owned by these shareholders. While this distinction often may not be clear, it is obvious in this case where PKNS holds more than 50% of the shares and therefore controls WHB. It is impractical to require that PKNS appointed directors of WHB must cause WHB which they control and supervise, to undertake protection of the minority shareholders, when they represent PKNS interested to take over all the shares. To keep the rights between shareholders *inter se* and the company whose shares they hold separate, one could only accurately say that the majority shareholders, and the directors appointed by them, have a duty to respect the rights of minority shareholders.

[11] That s. 176 applies also to applications for an order to hold a court convened meeting to consider a Scheme of Arrangement proposed by a member of a company is well established. The word "arrangement" is construed liberally: *Australian Securities Commission v. Marlborough Gold Mines Ltd* [1993] 112 ALR 627, 636. Any arrangement which touches the rights and obligations of the company or its members may come under s. 176: *Re NRMA Ltd* [2000] 33 ACSR 595, 603.

[12] The key feature of a court convened meeting under s. 176 is set out in sub-section (3) thereof:

> (3) If a majority in number representing three-fourths in value of the ... members or class of members present and voting either in person or by proxy at the meeting ... agrees to any compromise or arrangement the compromise or arrangement shall if approved by order of the Court be binding on all ... the members or class of members (as the case may be) and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company.

[13] In *Re NFU Development* [1973] 1 All ER 135 at 140, it was explained the object of the section is not confiscation, and there must be something analogous to consideration to support the participation of all sides in the arrangement. Generally, before it exercises its discretion to order a court convened meeting under s. 176(1) of the Act, the court will consider whether:

A a) The Scheme proposed to be undertaken is fair and reasonable: *Sri Hartamas Development Sdn. Bhd. v. MBF Finance Bhd* [1990] 1 CLJ 827; [1990] 3 CLJ (Rep) 106.

b) The scheme was cast in the terms such that it is likely to be
B approved at the shareholders' meeting and whether the court was likely to sanction it at the subsequent application: *Sri Hartamas Development Sdn Bhd v. MBF Finance Bhd* [1990] 2 MLJ 31, 35; *Twenty first Century Oils Sdn. Bhd. v. Bank of Commerce (M) Bhd & Ors (No. 2)* [1993] 2 CLJ 677; *Re*
C *Sonodyne International Ltd* [1994] 15 ACSR 494, 497.

[14] The approval of the scheme by the resolution of the board of the company or by the company at the general meeting is a relevant consideration as to whether the Scheme of Arrangement
D proposed is fair and reasonable and likely to be approved in the shareholders' court convened meeting.

[15] The reason for resort in this case to s. 176 is stated by PKNS at p. 11 at para. 37:

E > 37. The application under Section 176 is necessary as it would be impracticable to obtain the consent of all shareholders interests are affected by the Scheme of Arrangement, which would otherwise be required before the Scheme of Arrangement could be implemented. In this respect, the "Scheme Paper" will constitute the statutory contract between WHB, the shareholders of WHB
F > and PFFIM upon sanction by this Honourable Court ...

[16] The intention of the application under s. 176 is clearly to be able, with the sanction of the court, to take over all of the WHB shares held by minority shareholders at RM3.50 being the
G consideration proposed by PKNS or such adjusted price as may be applicable, by proceeding in due course if necessary to the provisions of s. 180 of the Companies Act 1965.

[17] The PKNS is a member of WHB. As such member it is
H entitled to make the application for a court convened meeting in this originating summons in respect of any scheme of arrangement proposed by it as a member of WHB. The objection that PKNS has no locus with regard to a proposal to take WHB private cannot stand. That PKNS would transfer its shareholding to
I PFFIM, a wholly owned subsidiary of PKNS, to be the holder of its shares in WHB does not defeat the fact that at the time of the application PKNS is still the shareholder.

[18] The Scheme of Arrangement as proposed is a takeover of WHB. But it is not a direct takeover by PKNS:

> 22. PKNS is not a proposed party to the Scheme of Arrangement as it will have to transfer all its WHB Shares to PFFIM prior to the Scheme of Arrangement becoming effective.

[19] Whether it is described as through PFFIM, or using PFFIM as a vehicle, the takeover is in law a takeover by PFFIM. It is only indirectly by PKNS. Indeed the above goes further in stating directly PKNS is not a proposed party to the scheme of arrangement. As such the application for takeover ought to be made by PFFIM, which cannot do so under s. 176 since it is not a member of WHB.

[20] This application by PKNS before the court, being in fact by the majority shareholder to obtain a court order for a court convened meeting for another legal entity to acquire its shares and the shares of the minority shareholders in WHB. It is not a scheme of arrangement envisaged under s. 176.

[21] WHB is furthermore a public listed company. In respect of public listed companies, specific laws have been put into effect. The purpose is to obtain and maintain the confidence of investors to purchase shares in public listed companies as minority shareholders. While if no specific legislation had been enacted for public listed companies s. 176 could apply, the fact of specific legislation requires having been enacted means that the specific legislation must be applied. For this reason the Securities Commission Act 1993, specifically applying to takeovers of public listed companies must be adhered to. Even if it is argued there are inadequacies in the provisions, that issue is properly addressed in the context of an application or action made under that legislation.

[22] The application before this court was made while various other applications for approvals as well as exemptions are outstanding from the administrative authorities. If after an order is granted by the court the scheme cannot proceed to the court convened meeting because of a necessary administrative approval or exemption not being obtained, the resources of the court would have been resorted to, and the order of court obtained, in vain.

A The order of court under s. 176 should be sought only after all administrative approvals and exemptions have been obtained, and other preconditions have been satisfied.

[23] For the reasons above, the application by the applicant is B dismissed with costs.

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